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Reports of Malaysian and Singapore Cases

DETERMINED BY

THE HIGH COURTS

AND BY

THE FEDERAL COURT

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

CHENG KENG HOONG v. GOVERNMENT OF THE FEDERATION OF MALAYA

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and MacIntyre J.) January 24, 1967]

[K.L. — Federal Court Civil Appeal No. X23 of 1966]

Arbitration — Award — Alternative form — Award in form of special case stated — Limited time for setting down case — Final award published — Neither party applying to court to set down the special case stated within prescribed time or for extension of time — Whether consent or waiver can confer jurisdiction — Arbitration Ordinance, 1950, s. 12(2) — R.S.C., 1957, O. 64 r. 14.

This was an appeal from a decision of the High Court ([1966] 2 M.L.J. 33) on a reference of a special case stated under an arbitration award. The award in this case was published on November 26, 1964. Neither party applied to court to set down the case which the arbitrator agreed to submit to court in the form of the special case stated for hearing within the six weeks or for extension of time. On February 23, 1965 the appellant took out originating summons to hear the case stated. Counsel for the appellant submitted that the question as to whether the proceedings before the High Court were valid or not should not be raised at this stage as the respondents by submitting to the exercise of jurisdiction by the learned judge to hear the special case stated, must be deemed to have waived their right to object to the setting down of the application for hearing out of time; and that besides, they had consented in writing to the extension of time up to January 30, 1965 for the application to be made.

Held: (1) under its own terms the award in the final and conclusive form came into effect on January 8, 1965. In the result, the right of the parties to refer the case stated abated on that day;

(2) once the award in its final and conclusive form had become effective, there was nothing more that an aggrieved party could do, except, if so advised, to apply to the court to set aside the award under the provisions of section 12(2) of the Arbitration Ordinance, 1950, and in accordance with O. 64 r. 14 of the Rules of the Supreme Court, 1957;

(3) consent or waiver cannot confer jurisdiction or power to the court to hear and determine an issue or a cause of action which is non-existent.

Cases referred to:—

(1) *Re Olympia Oil and Cake Co. Ltd. and Mac-Andrew Moreland & Co. Ltd.* [1918] 2 K.B. 771.

(2) *J. L. Lyon & Co. Ltd.* v. *Haddock, Parker & Co.* [1919] W.N. 11.

(3) *S. J. & M. M. Price Ltd.* v. *Milner* [1966] 2 All E.R. 780.

FEDERAL COURT.

Heng Cheng Swee for the appellant.

L. T. Chan (Miss) (Federal Counsel) for the respondents.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal against the decision of a judge of the High Court at Kuala Lumpur in Originating Summons No. 39 of 1965 on reference of a special case stated under an arbitration award. The matter in dispute was whether a sum of $31,592.44 claimed by the appellant from the respondents as being the cost of materials supplied and work done in connection with a building contract was an amount expended over and above the agreed contract price of $470,000.

The appellant claims that although the extra work done and materials supplied were indicated in the electrical layout drawings supplied by the respondents, they were not shown in the specification on the basis of which he had tendered for the contract. He further claims that after the contract was concluded he had sought clarification of the discrepancy and was informed by one Mr. Hewish in a letter written on behalf of Mr. Callow, the 'superintending officer' under the contract, that the 'extras' in question were outside the scope of the contract and that he would be paid accordingly.

The respondents, on the other hand, contend that the appellant was aware when he tendered for the contract that the drawings and specification were integral parts of the contract; and that he had agreed to supply the necessary materials and execute the work required under the contract for the aforesaid price of $470,000. They further contended that they were not bound by any promise made by Mr. Hewish who was not

their servant or agent, and deny that he was authorised by Mr. Callow to write the letter in question.

At the suggestion of counsel for the appellant, the arbitrator agreed to submit to the court in the form of a case stated two questions of law, namely, (1) whether the letter written by Mr. Hewish, a member of a firm of consulting architects engaged by the respondents in connection with the contract, was binding on the respondents; and (2) whether under clause 40 of the conditions of the contract, the arbitrator was entitled to go behind the letter and consider whether the decision of Mr. Hewish was justified or not by the evidence.

The arbitrator, however, instead of first referring the case stated for determination by the court and then delivering his award on the basis of the court's ruling, made his award in the alternative form. The first alternative was in the form of a case stated whereunder if the court decided the first question of law in the affirmative and the second in the negative, the appellant was entitled to be paid the sum of $31,592.44 claimed on the basis of materials supplied and work done over and above the contract price and for consequential relief. The second alternative was also in the form of a case stated whereunder if the court decided the first question in the negative or the first and second questions in the affirmative, then the appellant was to be responsible for the completion of the work under the electrical layout drawings within the agreed contract price and was to pay the costs of the arbitration and the arbitrator's fee and charges. The third alternative was in the form of a final and conclusive award deciding the dispute in favour of the respondents and directing the appellant to pay the costs of the arbitration and the arbitrator's fee and charges with a proviso that the award was to take effect at the expiry of six weeks from the date of the publication of the award if in the meantime the special case stated under the first two alternatives was not set down for hearing before the court or within such extended time as the court may allow or upon withdrawal of the application after it had been set down for hearing.

The award was published on the 26th of November, 1964. Neither party applied to court to set down the special case stated for hearing within the six weeks or for extension of time. Under its own terms the award in the final and conclusive form came into effect on the 8th of January 1965. In the result, the right of the parties to refer the case stated under the first two alternatives of the award abated on that date.

However, the parties appear not to have fully realised the situation. On the 23rd of February 1965 the appellant took out Originating Summons No. 39 of 1965 in the High Court to hear the case stated in the first two alternatives of the award. The application was set down for hearing on the 22nd of March 1965 and was finally disposed of on the 28th of February 1966. The court decided that the award in the second alternative should stand but for reasons which I am unable to fathom, the registrar of the court issued an order in the form of a judgment ordering the appellant to specifically perform the requirements shown in the electrical layout drawings which had already been performed and to pay the costs of the arbitration, the charges and expenses of the arbitrator, and the costs of the application. The order as it stands is inconsistent with the judgment but the effect of either the order or the judgment is to set aside the award of the arbitrator in its final and conclusive form.

It is against this order that the appellant now appeals on the ground that the decision of the learned judge on the issues raised by the special case stated is wrong in law.

When the appeal came on for hearing at the July sitting, this court questioned the validity of the proceedings in the court below. It appeared to us that once the award in its final and conclusive form had become effective, there was nothing more that an aggrieved party could do, except, if so advised, to apply to the court to set aside the award under the provisions of section 12(2) of the Arbitration Ordinance, 1950, and in accordance with Order 64 rule 14 of the Rules of the Supreme Court, 1957. The hearing was then adjourned to the September sitting to enable counsel for the appellant to take time to consider the point.

At the resumed hearing, counsel submitted that the question as to whether the proceedings before the High Court were valid or not should not be raised at this stage as the respondents by submitting to the exercise of jurisdiction by the learned judge to hear the special case stated, must be deemed to have waived their right to object to the setting down of the application for hearing out of time; and that besides, they had consented in writing to an extension of time up to the 30th of January 1965 for the application to be made. Counsel further submitted that the main cause of the delay was the time taken to find out who should take the matter to court, that is to say, whether the arbitrator or one of the parties. He was under the impression that the arbitrator should have moved the court.

The form in which the award was made is not unprecedented. In *Re Olympia Oil and Cake Company Limited and MacAndrew Moreland & Co., Limited* [1] the award was similar. The arbitrators were asked to state a special case for the opinion of the court but they refused to do so on their own motion and proceeded to

make an award, first in the form of a special case under section 7(b) of the Arbitration Act of 1889 (corresponding to section 8(b) of our Arbitration Ordinance, 1950); and secondly in the form of a final and conclusive award. The award in the final form was to become effective if either party failed to give notice to the other of their intention to take the matter to court within 14 days of the award or if from 14 days of the service of the notice the award was not set down for argument before the court.

The validity of this order was questioned on appeal on the following grounds, namely; (a) whether the arbitrators had a right to make an award in the alternative form; (b) whether they had the jurisdiction to impose conditions as to the time within which either party must elect to adopt the award in the form of a special case. The Court of Appeal by a majority decision held that the arbitrators had not exceeded their jurisdiction in making the award in the alternative form, and the award must stand. This decision was followed in *J. L. Lyon & Co., Limited* v. *Haddock, Parker & Co.*[2]

In the instant case, the effect of the judgment of the learned judge in the court below is to set aside the award of the arbitrator in the final and conclusive form and to substitute therefor an award in the second alternative, although in the end the result is the same. In the first place, in my opinion, an award can only be set aside by the court on an application under section 12(2) of the Arbitration Ordinance. The recently reported case of *S. J. & M. M. Price, Ltd.* v. *Milner* [3] concerns an award in a dispute between the builders and the building owner which was remitted by the court hearing the special case stated to the arbitrator for reconsideration. The form of the award was held to be defective. Instead of posing the questions of law on which the court was to adjudicate, the award stated the issues which in the arbitrator's opinion arose and his conclusions thereon. The award was not made in the alternative form as in the instant case but appeared to have been made in the form of a tentative judgment in favour of the builders to become final and conclusive if the findings of the arbitrator were not set down for hearing by either party on a point of law within six weeks of the award being taken up. The owner set down the award as a special case for hearing within the prescribed time and also applied by way of notice of motion after the lapse of six weeks to set aside the award on the ground that the arbitrator had misconducted himself. The court dismissed the application to set aside the award because it was made out of time and without obtaining an order extending the time under Order 88 rule 5(1) of the Rules of the Supreme Court (corresponding to Order 64 rule 14 of our Rules of the Supreme Court). Then at the hearing of the application to consider the case stated, counsel for the owner asked the court to set aside the award or to remit it. The court remitted the award because it was defective in form and substance but refused to set aside the award because the application was not for an order to set aside the award. In this connection, Edmund Davies J., said:

> "I am not satisfied that the court has any power, of its own volition and in the absence of any duly instituted application by either party to that end, to set aside an award in the form of a special case".[3]

In the second place, on the date when the application was filed in court, the award in its final and conclusive form having come into force, there were no questions of law in the case stated under the first two alternatives of the award subsisting for determination by the court. Therefore consent or waiver cannot confer jurisdiction or power on the court to hear and determine an issue or a cause of action which is non-existent.

This appeal must therefore fail. Since the proceedings in the court below are from their very inception a nullity, no order will be made in regard to this appeal except to make an order setting aside the whole of these proceedings in Originating Summons No. 39 of 1965. There will be no order for costs.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Heng, Chen & Co.*

PUBLIC PROSECUTOR v. CHEW SHAW CHIN & ORS.

[O.Cr.J. (Williams J.) January 24, 1967]

[Miri — Criminal Trial No. K.63 of 1966]

Criminal Law and Procedure — High Court in Borneo — Offences committed outside the States of Sarawak and Sabah — Whether the High Court has jurisdiction — Courts of Judicature Act, 1964, ss. 22(1)(a), 23(2)(c), 25 — Criminal Procedure Code (Cap. 58), s. 7 — Local jurisdiction — Constitution of Malaysia, art. 121.

Penal Code, ss. 3, 108A & 121A — Conspiracy — Activities done in Brunei — Part of conspiracy taking place in Sarawak — Wether High Court has jurisdiction.

The High Court in Borneo is a creature of statute and was brought into being by the provisions of article 121 of the Constitution of Malaysia. The Courts of Judicature Act, 1964, regulates the jurisdiction and powers of that court and thus anything that conflicts with the plain words of that Act cannot stand. The words contained in section 22(1)(a) of the said Act are plain, and they mean that an offence committed outside the States of Sarawak and Sabah is not triable by the High Court in Borneo.

In this case as part of the conspiracy took place in Sarawak the High Court in Borneo had jurisdiction to try the case.